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Research Article

INTERACTION AND COMPETITION OF LEGAL SYSTEMS: A STUDY OF CIVIL PROCEDURE

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The long outlined process of globalization interferes not only with the economy, politics, and ecology but with law directly as well. Regarding globalization in the field of law, we use such terms as rapprochement, unification, and harmonization. That said, generally, the abovementioned terms are intended to denote the process of creating something shared, of a similar meaning. Conventionally, these processes can be observed in the framework of various integration associations. The opposite phenomenon is a competition of legal systems that provide for the establishment of the best conditions for social and economic development. The same is true for civil procedure as well. At the same time, in recent years, an interesting trend has emerged – competition within integration associations. This paper is the first attempt to show the aforementioned trend in the field of civil procedure. The authors note that this trend can be traced both in the EU (in the context of Brexit) and in the EAEU (in the context of establishing the Astana International Financial Centre and the AIFC Court). The paper analyzes the consequences of these actions in view of their impact on integration associations and a more detailed exploration of the legal status of the AIFC Court and its jurisdiction in this regard. Based on the research, the authors draw the conclusion that increased competition in the field of civil jurisdiction does not have to weaken integration associations, it can even enable further rapprochement.

Key words: *rapprochement of law, competition of legal systems, EU, EAEU, Astana International Financial Centre Court (AIFC Court)*

Introduction

Rapprochement of law, unification of law, harmonization of law, internationalization of law – this is hardly the entire list of terms Professor Peter Gilles ranked among the 'Babylon of verbal and conceptual confusion'[1] in one of his reports in 2003.

Currently, it is globalization that is called the natural scientific grounds for the interaction of legal systems. This process is global by nature; it involves a great many people as well as national and international social agencies, states, and their coalitions (blocks) (Perevalov, 2014: 7). However, it would not be fair to consider the very idea of the entire world 'shrunk into a single communication network with a lot of cells' (Bolz, Zons & Kittler, 2000: 7) to be a discovery of the 21st century. For example, K. Marx noted the following pattern in the preface to the first edition of *Das Kapital* (1867): 'Intrinsically, it is not a question of the higher or lower degree of development of the social antagonisms that result from the natural laws of capitalist production. It is a question of these laws themselves, of these tendencies working with iron necessity towards inevitable results. The country that is more developed industrially only shows, to the less developed, the image of its own future' (Marx, 1867).

When the concept of unification is examined in the European legal doctrine, it is noted that in this case, it means the process of creating something uniform or shared[2]. This phenomenon results in establishing a situation where the courts of different countries administer legal codes that are identical in content. Unification is a kind of apotheosis, the pinnacle of the process of creating something uniform or shared. That is why the words 'unified' and 'uniform' are essentially synonyms (Kropholler, 1975: 19). Rapprochement of law, by contrast, is a process aimed at overcoming the existing differences in various legal orders by establishing close, but not identical legal codes.

It is the rapprochement of law that is considered a broader category (generic concept) in Russian legal doctrine. It unites all the ways of creating uniform codes: rapprochement of law refers to a complicated legal phenomenon that manifests itself in two inter-related processes that are still different in their content – unification and harmonization of law (specific concepts) (Dmitrieva, 2010: 93; Kutafin, 2007: 15; Mengliev, 2012: 156).

Besides, it is emphasized that rapprochement is essentially an activity or a process aimed at establishing, introducing into effect or enforcing similar or identical legal provisions that ensure elimination of differences in the legal regulation of a certain type of relations for the sake of convenience of transnational relations (Bakhin, 2003: 19). In turn, harmonization of law serves as a broader term of rapprochement of sort represents the establishment of uniform legal provisions of national law that ensure overcoming of differences in legal regulation of certain relations. However, it should be noted that harmonization is possible only when there are objective conditions for rapprochement of relations in some area, which implies some grounds for harmonization (Bachilo, 2000: 92).

Competition of systems (institutional competition) refers to the process of interaction when various elements of economic and political competition manifest themselves (Gerken, 1995: 77). Interaction of certain elements results in competition of systems. Since this is an issue of competition, private individuals get permission to choose one system or another. The availability of such an opportunity to choose implies a significant degree of openness in competing systems. The latter in turn also serves as a factor for the economic and labor migration of individuals. The factor of migration from one competing system/ country to another is a unique independent arbitrator who can indicate the available economic benefits impartially. Economically active private individuals use the disparity between expected net incomes in different systems, while the latter (systems) in their turn use and declare the available benefits. Meanwhile, politicians, being agents of competing systems, cannot take into account the special features of different systems and their level of economic development.

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[1] Aside from the aforementioned, there were also transnationalization of law, universalization of law, incorporation of law, correlation of law, coordination of law, and integration of law. See more: Gilles, P. (2003) Rechtsangleichung in Europa – Geschäftigkeit ohne Theorie? In: Festschrift Kostas E. Beys. *Dem Rechtsdenker in attischer Dialektik*, Band 1, Athen (Griechenland), S. 431–446; Huber, S. (2008) *Entwicklung transnationaler Modellregeln für Zivilverfahren: am Beispiel der Dokumentenvorlage*. Tübingen: Mohr Siebeck, S. 49.

[2] Regarding the correlation of French terms 'unification' and 'harmonization' see: Kerameus, K. D. (1992) *Revue hellénique de droit international*. 52, pp. 515; for the correlation of English terms 'unification' and 'harmonization' see: Stьrner, R. (1999) *Feasibility Study on Transnational Rules of Civil Procedure*. UNIDROIT Study LXXXVI. Doc. 1, pp. 4.

It should be noted that competition of systems manifests itself not only in migration factors but also in cross-border trade in goods, works, and services. The choice within the country is affected by various kinds of national regulation of the entry/launching of some goods, works, or services onto the market. Free movement of goods, works, and services implies that the importing country recognizes the legal status of the exporting country's regulation is equal to its own and vice versa. Within this framework, when choosing goods, works, or services, the consumer de facto chooses regulation as well. The advantage of external over internal regulation can result in import growth. These examples allow a deeper understanding of the competition between systems, which is a complicated phenomenon that can be interpreted from two viewpoints (Woolcock, 1994: 7).

On the one hand, competition between systems is a process that allows the consumer to test a certain system in practice and encourages the agents of the system to improve it continuously (competition between systems as a development process). On the other hand, competition between systems ranks all the existing and potential internal offers by their attractiveness, which provides the agents of the system control over the previous and new offers (competition between systems as a control process).

Moreover, in the modern world, there is not only competition between goods, works, and services, but also competition between different legal systems. Such systems not only converge and mutually enrich each other[3], but objectively compete with each other due to the special features of their development and a lot of different factors by offering the best conditions for doing business, fiscal terms, more convenient forms and procedures for dispute settlement and their general accommodation, as well as for the execution of the decisions made. In a word, various characteristics of a certain legal system allow evaluation of its benefits and seeing its downsides compared with others. That is why it is so important for the companies that run transnational businesses to choose a certain legal system that is the most cost-effective and legally sound, the potentially least controversial, and allowing building the system of legal and economic relations in the best way possible.

Materials and methods

The issues of rapprochement and competition of jurisdictions are always associated with the examination of foreign legislation. In this regard, the main method used by the authors is comparative law method. It is the use of this method that reveals the goals of rapprochement and competition, benefits and downsides of foreign (Lezhe, 2009) legal regulation, and outlines the paths for improvement (Kuznetcova, 2020). This method is the only way for the foreign researchers to trace the outlined trends mentioned in the Introduction. The comparative law method is commonly used in Russian jurisprudence, including the science of civil procedure (Fokin, 2018).

The materials for this research included Russian and foreign (mainly British and German) civil procedure doctrines, foreign law (EAEU countries, France, Germany, United Kingdom), legal acts and directives of some international organizations.

Results

Competition between legal systems is based on the idea of creating better conditions for economic and social development, attracting people, and raising funds. In this respect, the law has long turned into another commodity that defines how attractive some country is to be chosen as the place for residence, marriage registration, investments, capital preservation, and inheritance, or as a jurisdictional venue for settlement of possible or already existing disputes (Yarkov, 2021). Different legal regimes in such fields as access to business and doing business, taxation, key institutions of civil law (registration of ownership, law of obligation, law of inheritance, property relations regime in the family, etc.), jurisdictional conditions and procedures, ensure that there is a practical opportunity for choosing the most reasonable model of the legal system, the most reliable in terms of the place for business registration, applicable law or jurisdiction

[3] Many researchers have focused on this matter. See, for example: Kudriavtseva, E. V. (2008) *Grazhdanskoe sudoproizvodstvo Anglii [Civil Proceedings in England*]. Moscow, Gorodets. (in Russian); Reshetnikova, I. V. (1997) *Dokazatel'stvennoe pravo SShA i Anglii [Evidence Law in USA and England*]. Yekaterinburg, Ural State Law Academy Publishing House (in Russian).

in case of a conflict. Aside from increasing investment attractiveness and raising financial resources, the choice in favor of a certain legal system creates a labor market for lawyers and legal institutions of the relevant legal system, for legal education, and has an impact on many other areas.

Discussion

The proponents of the idea of legal order competition instead of their rapprochement and coordination use both cultural and legal (Jayme, 1995: 167), and economic and legal reasoning (Kerber, 2000: 74). Their general idea is that law develops more successfully when the best solution to the problem is sought in the context of competing national legal orders (Kerber, 2000: 75; Kieninger, 2002: 25). Competition between legal orders in turn serves as a modification of the broader concept of the competition between systems (institutional competition in terms of politics, economics, culture, and law). It is customary for such institutional competition to refer to the process of interaction when various elements of economic, political, and other kinds of competition manifest themselves (Gerken, 1995: 77). Interaction of certain elements results in competition between systems.

That said, while remaining the driver for any development, be it the market for goods and services or a legal system, the factor of competition as it is has faltered significantly due to the impact of globalization, which in turn has led to the emergence of a great number of different integration associations of countries. Thus, since 1951, economic and legal integration has started in Western Europe; since 1967, countries of South-East Asia have maintained cooperation in the framework of the Association of Southeast Asian Nations (ASEAN); since 1988, the North American Free Trade Agreement (NAFTA) has been in force on the American continent; since 1989, the Asian Pacific Economic Cooperation (APEC) has emerged; since 1991, economic integration has intensified in South America in the framework of the MERCOSUR trading bloc; since 2015, the Eurasian Economic Union has developed, and currently new tendencies toward mega-agreements (TTIP), etc. have emerged. The states have recognized that rapprochement with like-minded allies while maintaining competitive conditions with the rest of the world can not only give a boost to their own development but also help to stand ground in the context of competition with its most economically powerful representatives.

Although integration associations established in order to build a unified legal framework (EU, EAEU) consider rapprochement of legal systems preferable in terms of providing equal and efficient access to jurisdictional mechanisms of defense of violated rights and prohibition of any discrimination, their current development signals that competition has emerged even within these integration associations.

Thus, starting in 2018, in the context of Brexit, the establishment of specialized state economic courts began in France, Germany, Belgium, and the Netherlands in order to meet the states' demand for increasing the attractiveness of their own marketplaces. It is emphasized in the scientific literature that the establishment of such courts was also a response to such claims as discontent with the settlement of economic disputes in general courts, drawbacks of arbitration proceedings, aspirations to use the opportunities provided by Brexit, and inability to use decisions of UK courts in accordance with Regulation (EU) No. 1215/2012, etc. (Vasil'eva & Varlamova, 2020: 146–169). Particularly, in 2018, the International Chamber of the Paris Commercial Court was rearranged to establish the International Chamber of the Paris Court of Appeal that exercises the powers and authority of appeal regarding the judgments made by the International Chamber of the Paris Commercial Court made by the first instance. Since March 1, 2018, special rules have come into force – the protocol regarding procedural rules applied in the International Chamber of the Paris Court of Appeal4. For example, they allow using any applicable law chosen by the parties, presenting the case and providing testimony of experts in English during the hearings, translating the judgment into English, etc.

At first glance, these new developments have little in common with the focus on a single legal framework, they are risky for rapprochement of legal orders when it comes to civil procedures. It is crucial to understand though that such legal 'experiments' generally fit into the 'rules of the game' created by the EU over the decades and fall in line with them, specifically, with the direct jurisdiction mechanism, judicial authorization, and judicial summons. That is why there is hardly any sense in discussing the threats to the European legal framework.

[4] Available at: https://www.cours-appel.justice.fr/sites/default/files/2019-04/Traduction%20en%20anglais%20du%20protocole%20CCIP-CA%20-%20V4%20.pdf [Accessed: 24 March 2022].

It is this type of innovation (establishment of specialized jurisdictional bodies) in those integration associations where either modern or effective supranational procedural rules are either absent or the reforms are implemented without reference to their content that should be considered much more dangerous. Thus, in 2015, the Astana International Financial Centre (hereinafter – the Centre) was established within the EAEU in accordance with Constitutional Law of the Republic of Kazakhstan No. 438-V 'On the Astana International Financial Centre'[5] of December 7, 2015, to serve as a territory within the city of Astana where a special legal regime in the financial sector is in effect (Art. 1).

By reason of the provisions of Art. 4 of the aforementioned Constitutional Law, the prevailing law of the Centre is based on the Constitution of the Republic of Kazakhstan and consists of: this Constitutional Law; acts of the Centre that are not contradictory to this Constitutional Law and can be based on principles, codes and precedents of the Law of England and Wales and/or standards of the world's leading financial centers accepted by the bodies of the Centre in the framework of the powers conferred by the Constitutional Law; the actual law of the Republic of Kazakhstan applied to the extent not regulated by the Constitutional Law and the acts of the Centre. Therefore, the Centre has extraterritorial jurisdiction within which only the Constitution of Kazakhstan, this Constitutional Law, UK Law, and other legal rules adopted by the Centre itself are in force. Since the Constitutional Law is a framework law, in practice, the Centre is completely autonomous and has rule-making prerogative powers restricted only by the Constitution of Kazakhstan.

The legal status of the Centre Court is no less interesting. According to clause 5, Art. 3 of the Constitutional Law of the Republic of Kazakhstan No. 132-II 'On the Judicial System and Status of Judges in the Republic of Kazakhstan' of December 25, 2000, 'A special status is granted to the Court of the Astana International Financial Centre that is not a part of the judiciary system of the Republic of Kazakhstan'. This circumstance is emphasized in Art. 13 of the Constitutional Law on the Centre: 'The Centre Court is independent in its activities and is not included in the judiciary system of the Republic of Kazakhstan'.

The Centre Court is aimed at protecting the rights, freedoms, and legitimate interests of the parties, and enforcing the Centre's prevailing law. It includes the first instance court and the court of appeal. The Court's jurisdiction is defined in the following way. The Centre Court does not conduct criminal and administrative legal proceedings and has the exclusive jurisdiction regarding the consideration and settlement of disputes arising between participants in the Centre, Centre bodies and/or workers from abroad; consideration and settlement of disputes associated with any operations performed in the Centre and subject to the Centre Law; consideration and settlement of disputes submitted to the Centre Court upon mutual agreement of the parties. The Centre Court has exclusive jurisdiction for interpreting codes and acts of the Centre. The judges of this Court are British lawyers, i.e., not Kazakhstan citizens.

Since UK Law and Law of the Centre itself serve as applicable law, when settling disputes, the Centre Court may also consider the judicial decisions of the Centre Court for specific disputes that have already come into force and the final judicial decisions of other courts of common law jurisdictions. Judicial decisions of the Centre Court of Appeal are final, not subject to appeal, and mandatory for all individuals and legal entities. Execution of Centre Court decisions in the Republic of Kazakhstan is performed in the same order and on the same terms as the execution of judicial acts of courts of the Republic of Kazakhstan. However, translation of the Centre Court's decisions into Kazakh or Russian should be ensured in the manner established by acts of the Centre.

According to K. Kelimbayev, the Managing Director of the Centre, 'On the territory of foreign countries, decisions of the AIFC Court shall be executed in accordance with the terms of international treaties ratified by the Republic of Kazakhstan' (Lord Wolf & Campbell-Holt, 2019: X). At the same time, more conservative estimates of the outlook for enforceability of decisions by the AIFC Court can be found in the literature, at least on the territory of EAEU member states, since examination of the status of this Court raises quite a lot of questions (Branovitskii, 2018: 27–330).

The exclusive nature of the Court's jurisdiction and the legal status of the Court itself, since it is not a part of the judicial system of the Republic of Kazakhstan can be listed among the reasons for concern. Thus, the Kazakhstan legal doctrine emphasizes that the Centre Court is a sui generis judicial body since it has jurisdiction to settle 'constitutional', investment, financial, and labor disputes, as well as to hand down decisions regarding the interpretation of legal codes of the Centre (Daulenov & Abilova, 2016: 32).

[5] Available at: https://online.zakon.kz/document/?doc_id=39635390 [Accessed: 24 March 2022].

In respect to the Court's jurisdiction that is claimed to be exclusive, the question arises as to whether the Centre Court can have international jurisdiction. With this interpretation in mind, a lot of questions arise regarding the Court's status. Due to its independent nature (it is not a part of the judicial system), the multilateral agreements in force on the territory of the CIS and EAEU countries do not apply to it in terms of international jurisdiction regulation. In the Kyiv Treaty and then in the Chisinau Convention, it is primarily state courts[6] integrated into a single state judicial system of contracting parties that are meant as 'courts of contracting states'. Thus, for instance, it is quite difficult to estimate how the Court of Kyrgyzstan will interpret the rule of Art. 24 of the Chisinau Agreement if identical court proceedings were initiated previously in the Centre Court.

Of course, such modelling requires relying upon the assumption about the inclusion of trans-border activities in clause 4, Art. 13 of the Constitutional Law. In the case of literal interpretation, the rule in question is about disputes of participants within the Centre without the emergence of trans-border elements[7]. At the same time, the real estate of some Centre participant (disputing party) located in the territory of another country can serve as such an element as well. In this case, collisions of international jurisdiction can occur if the Centre Court is to interpret sub-clause 1, clause 4, Art. 13 as the one extending to international jurisdiction. Against this background, some 'shared legal status' of the judgments delivered by the Centre Court and state courts mentioned in clause 8, Art. 13 will by no means enable collision settlement. Thus, in case such property is located on the territory of Kyrgyzstan and a dispute regarding property rights arises between two Centre participants, it is only Kyrgyzstan state courts that will have exclusive jurisdiction based on Art. 4 of the Kyiv Treaty and Art. 22 of the Chisinau Agreement. No decisions by the Centre Court for this dispute can be executed on the territory of Kyrgyzstan due to Art. 9 of the Kyiv Treaty and Art. 59 of the Chisinau Agreement (seen as one made in violation of jurisdiction rules).

Besides, the challenges associated with establishing the Centre Court's legal status in the Constitutional Law along with the simultaneous operation of the International Arbitration Centre can result in some problems associated with the recognition of judicial decisions delivered by the Centre Court in EAEU countries and pose a question of legitimacy of their trans-border validity (within the EAEU) in general. As it has already been mentioned, in accordance with clause 7, Art. 13 of the Constitutional Law, judicial decisions of the Centre Court of Appeal are final, not subject to appeal, and mandatory for all individuals and legal entities. Execution of Centre Court decisions in Kazakhstan is performed in the same order and on the same terms as the execution of decisions delivered by courts of Kazakhstan (clause 8, Art. 13). However, translation of the Centre Court's decisions into Kazakh or Russian should be ensured as established by acts of the Centre.

Due to the lack of a clearly determined legal status of judicial acts passed in the Kazakhstan legislation, the issue of trans-border validity of decisions by the Centre Court, as well as potential recognition of their validity and their execution beyond Kazakhstan will inevitably run into international legal regulation of the CIS period.

Per the existing multilateral agreements (except for the Kyiv Treaty) in the post-Soviet states, it is only the state authorities, including judicial authorities (justice institutions) and public officials that are considered competent bodies. As for the regulation established in Art. 3 of the Kyiv Treaty, where courts of arbitration are mentioned along with 'other authorities with the competence to settle disputes' as 'competent' courts along with state courts, some researchers consider this regulation random and lacking in terms of the legal writing of the Treaty (Kanashevskii, 2006: 13–17).

The lack of mention of any potential recognition and enforcement of the Centre Court decisions within multilateral agreements in itself implies that when a petition for recognition and enforcement of the Centre Court's decision is submitted to the court of an EAEU member, the latter can deny such recognition based on the general condition of recognition – an international treaty (that allows potential recognition) along with the 'special' status of this judicial body (not a part of the Kazakhstan judicial system). Moreover,

[6] In the Kiev Treaty, courts of arbitration belong to the concept of 'authorities to settle commercial disputes' (Art. 3).

[7] The broad interpretation is enabled by rules of Section 5 'Jurisdiction of the Court' of the Regulation of the Centre Management Council of December 5, 2017 'On the Court of the Astana International Financial Centre' dedicated to extension of jurisdiction to any disputes arising between the AIFC's Participants. Available at: http://laws.aifc.kz/files/3c79917a4b9e44f2/3.%20Legislation%20-%20AIFC%20Court%20Regulations%202017.pdf [Accessed: 24 March 2022].

the need for enforcing any decision beyond Kazakhstan can arise at any moment, when one of the Centre participants (registered or accredited) as a disputing party is found to have property outside of Kazakhstan against which a claim can be made.

Conclusion

Individual cases of increased competition in those systems (integration associations) that have previously been positioned exclusively within the rapprochement paradigm examined in this paper should not be seen as isolated instances of strictly negative connotation. As it has been noted already, competition does not exclude rapprochement and vice versa. Such reforms do not have to result in a weakening of an integration association or a decreased level of trust within it, given that the general rapprochement context (established institutional cooperation framework) is not taken out of context. Cases with specialized courts in some EU member states are vivid examples.

Additionally, even in the framework of an integration association, the states, while being subject to unified "rules of the game" can realize at a certain point that those who do not abide by these rules due to the lack of any restrictions imposed by membership in one integration association of another can have more beneficial positions. In this respect, the report 'Civilistic Legal Traditions under Question: Regarding Doing Business Reports of the World Bank' prepared by a group of French professors, lawyers, and notary publics in 2006 draws special attention (Griadov, 2007). The work constituted thorough research of actual and legal raw data that allowed making quite an accurate note of the actual groundlessness of many Doing Business reports as well as noting the benefits of the civil law system that let it serve as the basis for economic development.

In the cases where there is no effective institutional framework for cooperation between states in the field of justice within integration associations affecting the level of the legal definability of the participants, any 'legal experiments' related to the issues of international jurisdiction or authorization should be treated with extra caution since this only promote it further.

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